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BEFORE THE FEDERAL ELECTION COMMISSION

IN THE MATTER OF:)
)
 PROBABLE CAUSE HEARING MUR 6334)
)

1050 1st Street, N.E.
 Washington, D.C.

Wednesday,
 Washington, D.C.

The parties met, pursuant to the notice, at
 2:00 p.m.

APPEARANCES:

For the Commission:

CAROLINE C. HUNTER, Chair
 ELLEN L. WEINTRAUB, Vice Chair
 MATTHEW S. PETERSEN, Commissioner
 STEVEN T. WALTHER, Commissioner

For the General Counsel:

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P R O C E E D I N G S

(2:00 p.m.)

COMMISSIONER WEINTRAUB: We have Chair Hunter on the phone. Is that right, Chair Hunter?

CHAIR HUNTER: Yes, that is. Thank you very much for conducting the hearing. Appreciate it.

COMMISSIONER WEINTRAUB: Thank you. We need to have you present, at least telephonically, in order to have a quorum, but the Chair has asked me to sit and run the hearing, because it's very difficult to call on people when you can't see them.

Representing the Respondent today is Jason Torchinsky of Holtzman Vogel Josefiak Torchinsky, and a couple of FEC alums, Mike Bayes, who is also with the Holtzman Vogel firm, and our old colleague, David Mason from Aristotle. So, welcome to all of you.

On May 24, 2011, the Commission found reason to believe that Aristotle International, Inc. violated 52 U.S.C. 30111(a)(4), and began an investigation. On February 28, 2018, after pre-probable cause conciliation efforts did not result in an agreement, the Office of General Counsel notified Aristotle that OGC was prepared to recommend probable cause to believe and sent its brief to you.

On June 13, 2018, you provided a reply brief

1 and requested a probable cause hearing which was
2 granted, and here we are.

3 To start today's hearing you will have such
4 time as reasonably needed to make an opening statement
5 or presentation, 15 or 20 minutes, and you can reserve
6 time for closing statement if you desire. We will
7 then have an opportunity to ask questions and at that
8 time Commissioners may also ask clarifying questions
9 of the Office of General Counsel or the Office of the
10 Staff Director, if any. The transcript will become
11 part of the record and may be relied upon for the
12 determinations made by the Commission, and the
13 Commission will make a transcript of this proceeding
14 available to the Respondent.

15 Thank you, and begin whenever.

16 MR. TORCHINSKY: Great.

17 Thank you, Commissioners. We appreciate you
18 hearing from us and granting our request for the
19 probable cause hearing. I also want to point out that
20 present with us today is Dean Phillips as well. He is
21 the co-founder of Aristotle and the current president
22 of Aristotle. So, I just wanted to point out that
23 he's in the room with us as well.

24 This is the second time we're before the
25 Commission with functionally the same product. CM-5

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1 was dismissed by the Commission in MUR 5625, and again
2 the focus in MUR 5625 was under a restricted non-
3 downloadable information that was available in that
4 prior product. Only names available to the committees
5 and the political candidates that were -- that had
6 access to the CM-5 software were information that was
7 already in the client data set. The only thing that
8 was added was what was available, the donor
9 information that was available.

10 While the Commission split 3/3 on that mark,
11 the new product is called Relationship Viewer, and we
12 followed the guidance of the controlling Commissioners
13 in that case. So, what I wanted to do, I wanted to
14 start my presentation by showing you what actually
15 happens when you go and access this product. I
16 emailed the Powerpoint here to OGC last week, and you
17 all were gracious enough to accommodate our technical
18 needs for displaying this.

19 So, I wanted to sort of walk you through
20 what we're talking about before we get into the
21 discussion of the law so you can see the demonstration
22 of the product.

23 So, the first thing you see when you show up
24 here is this is your client database in Aristotle 360,
25 and you look up the individual about whom you are

1 seeking information. In this case we have chosen Dean
2 Phillips, who also happens to be with us in the room,
3 as just the sample individual that we chose for the
4 purposes of this demonstration.

5 You can see before you go to the
6 Relationship Viewer, the first thing that you see is
7 the FEC warning and it says, in case you can't read it
8 from the screen and the books in the record, "Any
9 information copied or otherwise obtained from any FEC
10 report or statement, or any copy, reproduction, or
11 publication therefore filed under the Act, shall not
12 be sold or used by any persons for the purposes of
13 soliciting contributions or for any commercial
14 purpose, except that the names and addresses of any
15 political committee may be used to solicit
16 contributions from such committees."

17 So, that warning pops up before you can get
18 to the next screen.

19 The next screen you see is actually the
20 Relationship Viewer. And so what you see on the
21 screen is Dean Phillips, and you see some blue lines
22 and some green lines and some gray circles and some
23 green circles, all emanating off of Dean Phillips.
24 And if you look on the left-hand side of the screen
25 you will see where it says "relationships", and the

1 relationship that it shows are Aristotle PAC, with
2 people from Weiland, with , with
3 , with , and with
4

5 And in this particular case, and then I want
6 to stress this because this is important when we get
7 into discussions of the facts, all of the names of the
8 individuals in here are already in the client's data
9 set, including the address information. No name or
10 address information of individuals is pulled from the
11 FEC data sets in Relationship Viewer, and I think
12 that's very important.

13 And now you see, if you mouse over a
14 particular individual, again whose name was already
15 pulled from the client's data set, if you mouse over
16 to the individual you can see there that there is
17 contributor information displayed.

18 So, in this case when you click on, mouse
19 over to you see it says, "Details:
20 people for Weiland, contribution \$500," and that's
21 what you see on the screen. This screen does not
22 produce, this system does not produce downloadable
23 information. It's a display on the screen only.

24 You can't download this information. You
25 can't export this information into any kind of a

1 spreadsheet or database. But you can view this
2 information on the screen.

3 I'd like to show you what happens when you
4 go to -- excuse me -- go to a more complicated record.
5 In this case, is the individual whose
6 name we selected. And just to give you a sense of
7 what happens in a more prolific donor now on the
8 screen what you see is in the middle, and
9 a lot of circles and arrows or circles and lines
10 connected to a lot more individuals and a lot more
11 committees.

12 And this is what you would see on the screen
13 if you accessed Relationship Viewer for someone who is
14 a more prolific donor than our -- than our Dean
15 Phillip.

16 And again, what you see, only when you mouse
17 over at particular individual committee do you see who
18 that individual gave to. So, in this case when you
19 moused over, and I can't even tell from the screen who
20 you moused over, but you moused over an individual
21 name here, and it tells you that Hanson Clark for
22 Congress received a \$250 contribution from that
23 person. And again, this is non-downloadable, non-
24 exportable, but this is how the Relationship Viewer
25 actually works.

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1 So, that's what the software actually does,
2 and I thought it was important that you all have an
3 understanding of what a user of this product sees on
4 the screen, as we get into the discussion that I would
5 like to sort of walk you through.

6 I want to start first with the meaning of
7 the statute. The statute here is designed to prevent
8 list brokering, and to prevent solicitations or
9 commercial sales of the information so that that
10 information can't be used for other solicitations.

11 To give you a sense of how the Second
12 Circuit described it in PDC, the Circuit said, "The
13 prohibitions extend for purpose of soliciting
14 contributions in commercial purposes, we read the
15 latter prohibition will accomplish only those
16 commercial purposes that could make contributors prime
17 prospects for all kinds of solicitations," and they
18 cite back to remarks of Senator Bellmon when adopting
19 the original use restrictions.

20 So the legislative history confirms that the
21 Second Circuit went back to Senator Bellmon's
22 colloquy. We've quoted it in our brief. I don't feel
23 the need to reread it to you, unless you would like me
24 to.

25 The D.C. Circuit also understood this when

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1 it resolved the Legi-Tech cases. In the Legi-Tech
2 case, what the D.C. Circuit focused on was the sale of
3 names and addresses obtained from the FEC data set.
4 Relationship Viewer does not obtain names and
5 addresses from the FEC data set.

6 Even when the Second Circuit decided PDC in
7 1991, it also focused on the sale of names and
8 addresses and whether those names and addresses were
9 used in a way that could be designed for
10 solicitations.

11 The Commission has confirmed this
12 understanding of the law through advisory opinions,
13 including the Crowd PAC. It was Crowd PAC, 2014-07,
14 built on AOs from the 1980s, focusing on the sale of
15 names and addressing. Nothing in relationship to your
16 polls' names and addresses from the FEC data base.
17 Nothing in relationship to your allowing to build a
18 list from Relationship Viewer. Every name and address
19 that you see in Relationship Viewer is already
20 existing in the Aristotle clients' data set.

21 OGC here departs from the law in three ways.

22 One, OGC appears to take the position that
23 any sale of contribution data is illegal. And if
24 that's true for Aristotle, there are at least six
25 other regularly available services that we've

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1 identified that do the same thing, and we are unaware
2 of any Commission action against those.

3 OGC raises this concept of an animating
4 purpose is grounds for illegality, which doesn't
5 appear in the statute or in the regulations.

6 And OGC tries to distinguish media uses from
7 non-media uses, particularly when we're dealing with
8 software publishing companies here, because what they
9 do is publish software.

10 And I also want to draw the Commission's
11 attention to some constitutional issues that would be
12 raised here.

13 First is Citizens United in 2010. This
14 undermines OGC's attempt to distinguish media entities
15 from non-media entities. In that case the Supreme
16 Court was clear that this notion that the government
17 can distinguish between so-called media entities and
18 non-media entities for constitutional purposes, was
19 not really a good distinction for the Commission to
20 rely on.

21 The Center for Responsive Politics, for
22 example, displays themselves with the same data. It's
23 a nonprofit. Huffington Post, a recognized news
24 outlet, was powered by Aristotle's databases when it
25 put its fund raise system up online. Relationship

1 Viewer actually provides less information than those
2 because the names already have to be in the client
3 databases.

4 The other two Supreme Court cases I want to
5 draw your attention to: one is Sorrell v. IMS from
6 2011, and we detailed this in our brief. In that case
7 restrictions on disclosure of government information
8 can facilitate or burden expression of political -- of
9 potential recipients and transgress the First
10 Amendment.

11 What the Supreme Court was saying there was
12 when you've got information that the government
13 requires you to have, you can use it. The purpose
14 restriction was -- in that case was limited on the
15 distribution of this pharmacy data for the commercial
16 context, and even in that case the Supreme Court
17 subjected (sic) that restriction to heighten scrutiny
18 and struck it down.

19 And, finally, Read v. Town of Gilbert in
20 2015, the Supreme Court said that essentially
21 distinctions based on the content of the speech are
22 subject to strict scrutiny and identify and again
23 stressed what the Court said in Citizens United in
24 2010, was that you can't look at the function of the
25 speech, you can look at -- and you can't distinguish

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1 based on the identity of the speaker.

2 And in this case it appears that OGC says,
3 well, because you are selling a bigger product,
4 somehow that means that you can't incorporate any
5 contribution data, even from people whose names and
6 addresses you've already had, into a product. And
7 Read basically says you can't treat Aristotle
8 different than you can treat Center for Responsive
9 Politics or Open Secrets or anybody else.

10 And so for those reasons we ask that the
11 Commission dismiss this matter and take no further
12 action, and with that I guess I'm open to questions.
13 I would like to reserve time for a closing statement
14 though.

15 COMMISSIONER WEINTRAUB: Any of my
16 colleagues have questions? Commissioner Petersen.

17 COMMISSIONER PETERSEN: Thank you, Madam
18 Chair, and thank you to all of you for being here
19 today for the very thorough submission that you gave
20 to the Commission.

21 When I originally voted on this, I guess
22 we're going back to 2011, it's been a number of years
23 have gone under the bridge since then, and so I've had
24 to go back and do a fair amount of recollecting of
25 what animated my vote, and I know that one of the

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1 original concerns I had was that based on the
2 marketing materials and some of what we knew about
3 Relationship Viewer at that time was that it provided
4 an ability for someone to enter a name, and that new
5 names that are not in your database could be generated
6 that then could potentially be used for solicitation
7 purposes.

8 Your representation, though, is that, that
9 is not the case; that you're not -- that names that
10 are not in your database are not being presented as
11 potential targets for solicitation.

12 MR. TORCHINSKY: That is correct,
13 Commissioner.

14 The database only -- the Relationship Viewer
15 only displays contribution histories for individuals
16 whose names and addresses are already in the Aristotle
17 clients' data set,

18 COMMISSIONER PETERSEN: Okay.

19 MR. TORCHINSKY: So, it does not produce any
20 new names and address. It could -- Relationship
21 Viewer does not produce any new names and addresses
22 for the Aristotle client utilizing Relationship
23 Viewer.

24 It's really a tool to better understand your
25 donors. You know, take for example, I mean, if you

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1 are, you know, wondering where you're donors are or
2 where you support is.

3 If you know that a number of your donors
4 have given to say pro life PACs or Pro Choice PACs, or
5 program control or anti-gun control organizations, or
6 are members of labor unions or have given to pro-life
7 or pro-choice causes -- I mean, knowing who your
8 donors give to is actually really helpful, not only
9 politically but, you know, in terms of building
10 further relationships with your donors.

11 If you know that, you know, you can use, for
12 example, the donor information to help, to help tailor
13 your messages for political purposes, not for
14 solicitation purposes. I mean, I ask Gary Goodwell
15 for solicitations too, but it can help you better
16 understand who your donors are, and that's the whole
17 purpose of this.

18 The purpose of Relationship Viewer is to
19 understand the relationships between the people that
20 are in your database. The only information this pulls
21 from any FEC data is the contribution history to the
22 other committees.

23 COMMISSIONER PETERSEN: Okay.

24 And so the primary purpose, as you state, is
25 to better understand your donors. You make the

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1 argument in your submission that that information
2 could also have a compliance-related purposes when we
3 refer in the Statement of Reasons that I and Chair
4 Hunter and then Commission Don McGahn wrote a number
5 of years ago -- we mentioned how the compliance
6 embedding feature in Campaign Manager 5 could be used
7 for compliance with the aggregate contribution limit.
8 Recently the aggregate contribution limit has been
9 struck down with the contribution Supreme Court case.

10 What would be potential compliance use for
11 it now?

12 MR. TORCHINSKY: Sure.

13 For example, there are lots and lots of
14 joint fundraising committees. Joint fundraising
15 committees have proliferated. Candidates, in theory,
16 have access to that information by picking up the
17 phone and called the treasurer, but it's also easy to
18 see who has already contributed to you via a joint
19 fundraising committee by going to this, if the joint
20 fundraising committee has filed a subsequent report.

21 Because, as the Commission is well aware,
22 just because a joint fund raising committee take in a
23 contribution from John Smith or Jane Doe it doesn't
24 mean that they have necessarily within the last month
25 turned that around to the recipient committees. They

1 don't have to.

2 So, in some ways that's just one example of
3 a compliance feature that you could do. You could
4 look to see if, at least since the last report,
5 anybody who contributed to a JFC they're participating
6 in, and that's just one example of something that you
7 could use as a legal compliance tool.

8 But I don't know that you should necessarily
9 focus on that because this is -- this is a restriction
10 that is designed to promote the -- basically this
11 broker, in using FEC data. And no matter what they
12 can't do that with Relationship Viewer. You can't
13 download the information. You can't generate new
14 names and addresses from it.

15 So, whatever other functions people might
16 use it for, whether it's checking joint fundraising
17 committees, whether it's better understanding their
18 own donors, whether it's preparing a briefing paper
19 for a candidate who is going to have a meeting with
20 somebody, whether it's preparing a candidate for an --
21 you know, some kind of political meeting that people
22 that in your database are going to attend, and you're
23 trying to better understand who your audience is going
24 to be.

25 There's lots of reasons to have this

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1 information available to candidates and committees so
2 that they can have a better understanding of people
3 who are in their databases.

4 MR. MASON: So, the other current use is in
5 backup enforcement of federal paid employee
6 restrictions. And we have clients, so one thing the
7 Commission may want to understand as you're thinking
8 about this piece of software as a campaign tool, in
9 fact, probably the majority of users with software are
10 not political campaigns. Trade associations,
11 corporate PACs. And in these cases I'm about I'm
12 refer to, investment PACs are subject to pay employee
13 rules.

14 Now, the federal political contributions, of
15 course, aren't directly subject to the paid employee
16 ban unless you have a state officeholder who is
17 running for federal office. All these investment
18 banks are required to have backup screening programs
19 to ensure that their employees don't file a paid
20 employee restrictions.

21 And the way they do that is by looking at
22 their contribution history right here because the
23 covered officials are required to submit their
24 political contributions to their employers for pre-
25 screening, and if they find a contribution here that

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1 hasn't been submitted for pre-screening, then they
2 know they've got to go to the back-end and backup, and
3 we have a number of bank clients who use our software
4 for just that purpose.

5 COMMISSIONER PETERSEN: Okay.

6 MR. TORCHINSKY: I mean, you could also, I
7 mean and here's just the other reason why.

8 I mean, you almost think of it, this is a
9 convenience for the user, right, because you could
10 literally take the campaign manager window, sort of
11 make it smaller on your screen, open up a web browser
12 and go directly to the FEC website or to Open Secrets,
13 or the Center for Responsive Politics and look up the
14 same information.

15 But for -- you know, but for compliance
16 purposes if you've already got a bunch of these names
17 in your database and you want to know who they've
18 contributed to, it's a lot easier to go through it
19 when it's already in your data set and have the
20 information kind of already there. It's really a
21 convenience for Aristotle clients, rather than having
22 to do a two-step.

23 COMMISSIONER PETERSEN: So, in short, your
24 argument is that the purpose of the statutory
25 provision is, prevent list brokering, prevent use --

1 the commercial exploitation of a concerned citizen who
2 makes a contribution gives his or her name and address
3 in addition to the contribution, that name then
4 shouldn't be exploited for targeting for commercial
5 purposes, and as we mentioned, list brokering at the
6 outset.

7 And since neither of those things is
8 happening here, therefore we're not -- what we see in
9 Relationship Viewer isn't presenting a problem with
10 respect to the sale and use provision.

11 MR. TORCHINSKY: That's correct, because
12 it's not only is it not presenting -- I mean, not only
13 is it not giving you that new information, it's also
14 not providing information any way that is downloadable
15 from the system or in a way that could help you
16 mechanically build a list from what you see on the
17 screen.

18 COMMISSIONER PETERSEN: And would you say
19 that Relationship Viewer is an element that's provided
20 free or is there an element to the cost of the overall
21 program that's attributed to the Relationship Viewer?

22 MR. TORCHINSKY: Well, if you go to -- if
23 you go to Aristotle's website there's a contributor
24 look-up feature on the website. You can just go look
25 up a name and look at their contribution history. So,

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1 there's that feature that's free on Aristotle.com.

2 But obviously, you know, this is a --
3 Aristotle is a for-profit company. It provides this
4 service. This is one of many features in Aristotle's
5 -- in Aristotle 360.

6 So, I don't want to suggest that it's free,
7 because it's part of a software that people are paying
8 their monthly subscription to. But is there an extra
9 charge, or additional charge because the Relationship
10 Viewer is in there? No. It's part of the general
11 subscription to the software.

12 COMMISSIONER PETERSEN: Okay. That's all I
13 have right now.

14 COMMISSIONER WEINTRAUB: So, I have a
15 question about your patent application. Your patent
16 application says the road map provided by the
17 invention may provide a user with information enabling
18 the user as permitted by law to seek support of those
19 who may likely be positively disposed to contributing
20 to the user's organization.

21 So, if it is not a feature that's designed
22 to help you solicit these people for further
23 contributions, or for contributions at all, then why
24 does your patent application say that?

25 MR. TORCHINSKY: Look, knowing something

1 about a donor, your own donor, before you go meet with
2 them is important. I mean, if you're going to meet
3 with someone and ask them to write you a check for
4 \$2,700, knowing that they contributed to pro-choice
5 causes or to anti-gun causes might be really important
6 to a candidate.

7 Knowing if you're a political committee or
8 if you're trade association, if you're going to your
9 members and you know that, you know, this particular
10 member that you've looked up because their name and
11 address is in your database, if you know that they've
12 constantly contributed to Democrat candidates, you
13 might tell your message differently when you pick up
14 the phone and call that person and ask him to
15 contribute to the trade association or to the
16 corporate PAC. You might have your -- your own
17 internal messaging might well be different.

18 So, in that sense it's helping you learn
19 about people you already know. It's not giving you
20 new names. And in that sense it helps you design
21 your -- design your pitches. But it's not about --
22 it's not about taking -- it's not about getting you
23 new names and addresses. It's helping you better
24 understand the people that you're talking to.

25 So, it is not a list brokering or a list

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1 development tool like what was -- like the Courts
2 explained in Legi-Tech and PDC. It's just not -- it
3 doesn't do those functions.

4 COMMISSIONER WALTHER: So, are you saying
5 that this is not going to be used for solicitation
6 purposes because, I mean, we see this kind of -- on
7 its way through most of the documentation we're
8 looking at certainly is, to me, if not that, what is
9 the principal source of clientele?

10 MR. TORCHINSKY: I mean, as we've explained
11 over and over again, I mean, the clientele for
12 Aristotle 360 are political committees, candidates,
13 trade associations, corporations, anybody that needs
14 to comply with FICA, anybody that is engaged in
15 grassroots lobbying activities, anybody that needs to
16 communicate with their -- their members about all the
17 policy issues.

18 There's a lot of features to Aristotle 360
19 that are beyond just FEC compliance. And Relationship
20 Viewer is a tool that helps you understand who is in
21 your data set. And that's why this is not a
22 commercial solicitation prohibited by the statute
23 because it's only giving you additional information
24 about people you already know. You already have their
25 names and addresses.

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1 So, whatever else you use that for it's only
2 basically supplementing the information that you
3 already have about people and not giving you new names
4 and addresses to solicit.

5 You know, different users of Aristotle 360
6 will use the -- will use Relationship Viewer for
7 different things, but it's never going to -- it just
8 doesn't have the ability to generate new names and
9 addresses to solicit.

10 COMMISSIONER WALTHER: So, it just makes
11 them -- people on that list are identifiable and you
12 would be sifting from list --

13 MR. TORCHINSKY: Well.

14 COMMISSIONER WALTHER: -- would be the most
15 prominent donors in certain cases.

16 MR. TORCHINSKY: I mean, remember, in
17 Relationship Viewer you can't electronically download
18 the information or export it to a list. So, you can
19 see it on the screen.

20 If you're going to talk to Jane Smith
21 tomorrow about whether she wants to contribute to the
22 corporate PAC, you could go into Relationship Viewer,
23 you could look up Jane Smith, and you could see who
24 else -- you know, whatever political committees Jane
25 Smith has given to. But you already know who Jane

1 Smith is.

2 But knowing that Jane Smith is a heavy donor
3 to Republicans or heavy donor to Democrats or supports
4 pro-life PACs or pro-choice PACs, if you're, you know,
5 her corporate employer, you may well tailor your
6 message to why she should give based on who she's
7 given, based on what she's given to others.

8 And that's not prohibited by the statute.
9 You're not giving Jane Smith's name and address to the
10 corporation. The corporation already has Jane Smith's
11 name and address.

12 COMMISSIONER WALTHER: But in the process
13 information is gained about other people who are on
14 the -- who are on the list, and might induce you to go
15 to some people for a certain contribution amount or
16 not at all, X out, get -- not enough to call her, make
17 a telephone call.

18 So I mean, you can identify categories of
19 individuals who might help you decide what to do and
20 maybe when you make the -- or make the solicit. And
21 you even have maybe an entrée saying that, by the way,
22 you know, we got the information from our other client
23 named Mr. Jones. I mean, you would say, well, how did
24 you get that information.

25 I'm just wondering -- I'm a little

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1 interested in the effect on peoples' privacy, how
2 that would --

3 MR. TORCHINSKY: Well, take my Jane Smith
4 example. If Jane Smith is in my data set and I'm, you
5 know, Corporation X, and to take the example you just
6 gave, you know, Tom Jones is giving you the same
7 political committees. I see that Tom Jones is giving
8 to the same political committees as Jane Smith. I
9 only see -- and the relationship to her.

10 I only see Tom Jones's name because he's
11 already on my corporate list. I'm not getting Tom
12 Jones's contact information anew from any FEC
13 reporting in order to do that, and that's the critical
14 distinction here. This is not giving any user of
15 Relationship Viewer, any new names and addresses that
16 it doesn't already have in its own client base.

17 David Mason want to add something.

18 MR. MASON: I just want to make the point
19 about privacy interest. There can't a generalized
20 privacy interest at stake here because FICA is a
21 publicity statute and the government requires
22 campaigns to submit this information to the Commission
23 and requires the Commission to publicize it.

24 And so, you know, there is certain uses that
25 are prohibited, and I understand that, but the privacy

1 interest that this person is not going to be known as
2 a donor to this, that, or the other campaign or
3 political committee is void because you're required to
4 publicize it.

5 So, I -- you know, in terms of looking at
6 what the statute is intended to do, to the extent that
7 that informs you about the permissible uses, I just
8 think you need to be careful about generally saying
9 privacy interest because, I mean, former Commissioner
10 Snook probably would be very happy to join that
11 argument, but that would take you a place you see
12 where the statute doesn't go.

13 You see my point. Thank you.

14 COMMISSIONER WALTHER: Yes, but, you know, I
15 was thinking about privacy if you made contact as a
16 result of not so much the client, but the people might
17 get contacted as a result if they have the
18 information.

19 MR. MASON: And that is to the point that
20 this does not draw names or addresses that aren't
21 already in the database.

22 MR. TORCHINSKY: And if we didn't make that
23 clear in our pre-RTV submission, we probably didn't --
24 didn't communicate the product well enough. But from
25 the beginning, even before RTB, this system has never

1 drawn new names and addresses from the FEC database.

2 COMMISSIONER WALTHER: No, I understand
3 that. It's just a matter of who gets contacted and
4 for what reason that's already on the list.

5 My people might be contacted because George
6 gave a certain amount and, by the way, George knows
7 Fred, and that's -- they have something in common, and
8 they might generate enough information to change who
9 contacts are within -- solicitations are within the
10 group of already gotten that.

11 MR. TORCHINSKY: And even if what you posit
12 is correct, it's not permitted by the statute.

13 COMMISSIONER WALTHER: Well, that may be so.
14 I'm not -- I'm just kind of feeling my way
15 through the --

16 MR. TORCHINSKY: Correct. I understand.

17 COMMISSIONER WALTHER: -- changes of this
18 business as you propose it.

19 COMMISSIONER WEINTRAUB: So, if -- if you're
20 not using the FEC database to generate the names in
21 your database, where are the names in your database
22 coming from? Are these all prior donors?

23 MR. TORCHINSKY: The names in the database
24 come from any variety of sources.

25 It could come from people who have submitted

1 their names and addresses and email addresses on a
2 website. It could come from a list exchange with
3 someone else. It could come from, you know, your
4 existing donor list.

5 There's a lot of different ways for clients
6 to get names and addresses into the Aristotle
7 database. Because again, it's not just used for
8 soliciting contributions for political committees,
9 it's also used by clients, for instance, lobbying
10 activities. It's also used by clients for straight-
11 out get-out-the-vote kinds activities as elections
12 approach.

13 So, there's a lot of different sources of
14 names into the data set, but it's got to already be in
15 the client's data set, and that's what's critical for
16 FEC purposes.

17 COMMISSIONER WEINTRAUB: It's just not used
18 for solicitation, but it is used for solicitation?

19 MR. TORCHINSKY: You mean the Aristotle 360
20 -- and David can correct me if I misstate anything
21 here, but it can be used to send emails on any
22 subject. It can be used to send get-out-the-vote
23 email. It can be used to send emails or generate
24 mailing lists that say contact, you know, Congressman
25 Smith and tell him to vote yes or no on House Bill 1.

1 I mean, the client can use that list for
2 lots of different purposes.

3 MR. MASON: And as to Aristotle, we don't
4 populate a list in a client's database. The client's
5 database is the client's property, and the GDPR, if
6 you've had the joy of dealing with that, which made
7 that abundantly clear and a number of state
8 restrictions are coming on top of that, and that's
9 always been our contractual arrangement anyway.

10 So, the client adds most of the database,
11 Aristotle does not unless we're asked to do it, you
12 know, as sort of an administrative. In other words,
13 like, a client could give us a list and say can you
14 put this in my database, and we would do that for
15 them.

16 MR. TORCHINSKY: And warnings about not
17 using FEC data did derive from FEC or data drawn, or
18 data downloads from the FEC. It is the same warning
19 issue you saw before you access Relationship Viewer is
20 the same warnings that clients see before they upload
21 names to the data set. So.

22 MR. MASON: And if we were aware of a
23 client, say taking an FEC-derived list, we would tell
24 them.

25 MR. TORCHINSKY: And that would violate the

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1 contract.

2 COMMISSIONER WEINTRAUB: Now, you do, as the
3 general counsel's brief points out, market this as a
4 solicitation tool, though.

5 MR. TORCHINSKY: Well, again, I don't know
6 that solicitation tool is any term that anybody has
7 ever defined. I mean, could you -- I think the answer
8 is, could you use information that you see on
9 Relationship Viewer to impact how or whether or when
10 you ask somebody for a contribution? Sure, but that's
11 not prohibited by the statute.

12 But I don't want to -- this term
13 "solicitation tool" is a loaded term that OGC has
14 chosen for a particular purpose, which is to cast
15 aspersions on what Relationship Viewer actually is.

16 COMMISSIONER WEINTRAUB: I'm not using it in
17 any way to cast aspersions on anybody, but I'm just
18 reading some of the promotional material that is
19 familiar to you, and obviously because it's your
20 material, but also it's quoted on page 5 of the
21 general counsel's brief.

22 "This technology puts the exact information
23 campaigns need right at their fingertips, to
24 paraphrase Jerry McQuire, We show you the money. The
25 biggest sin in fund raising is not to ask. The second

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1 sin is not to ask enough. Fund raisers and campaigns
2 will never again overlook a prospect or leave money on
3 the table by asking for too little. With this
4 technology campaigns will raise much more money than
5 ever before."

6 I mean, it sure sounds like you're using it
7 for solicitation purposes.

8 MR. TORCHINSKY: Well, we have certainly
9 been clear that you could use information that you
10 generate from a relationship. It would impact how you
11 ask for money. We're not denying that. We're just
12 saying that doesn't violate what's in the statute.

13 COMMISSIONER WEINTRAUB: It's not use of FEC
14 date for solicitation purposes?

15 MR. TORCHINSKY: The way that the Courts
16 have defined -- the way that the Courts have
17 interpreted that particular statutory provision is
18 that it says solicitation or other commercial use, and
19 what they meant there is solicitation contributions or
20 other commercial use.

21 And when you go back to the colloquy and you
22 go back to how Legi-Tech and PDC defined it, it is,
23 you can't just prohibit it for -- you know, you can't
24 just downlist a list and only prohibit its use for
25 soliciting political contributions. You're also

1 prohibiting that list from being used for car sales
2 or, you know, marketing wallpaper or whatever it is
3 you might be selling.

4 And that's what the phrase, "other
5 commercial uses," means. It's not just limiting the
6 restriction on downloading names and addresses used
7 for political solicitation. It's restricting the use
8 of that downloaded information for other kinds of
9 commercial purposes like, you know, selling a car or
10 selling wall paper or paint or whatever it is you're
11 selling.

12 So, it's not -- it's not that any use of the
13 data can be prohibited. I mean, that's what -- that's
14 what was in Crowd PAC. That's what was in the PDC
15 case. I mean, again, you go to Center for Responsive
16 Politics, and they'll, for a fee, customize FEC data
17 for you. Not prohibited by the statute.

18 COMMISSIONER WEINTRAUB: Not for
19 solicitation purposes, though, I don't think. I mean,
20 Open Secrets is not in the business of soliciting
21 people nor is Crowd PAC.

22 MR. TORCHINSKY: And how do you know,
23 sitting here, if you were a custom data download from
24 Center for Responsive Politics, how do you know what
25 the user is doing with it? You don't, really.

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1 COMMISSIONER WEINTRAUB: Okay.

2 They're not marketing it as something that
3 can be used for solicitation, and you are.

4 MR. TORCHINSKY: Custom analysis of FEC
5 data? I mean, how is that not limited? I mean,
6 that's an unlimited -- that's an unlimited,
7 essentially, solicitation of the public to pay them to
8 analyze FEC data. We don't really know what that
9 means.

10 I mean, in this case we're not -- we're not
11 drawing names and addresses. This is not a list
12 brokerage, list development, list production tool. It
13 just technologically doesn't have the capability of
14 doing that.

15 So, using FEC -- and, you know, knowing that
16 there is initial FEC information, again, this is the
17 same information you can get if you opened up a
18 parallel web browser and went to FEC.gov. You can see
19 the same information there, if you want to look up
20 information about one of your donors.

21 So, that can't possibly be prohibited. We
22 were not drawing new names and addresses to solicit it
23 from the FEC data set. That's what is prohibited by
24 the statute.

25 What Relationship Viewer does is not that.

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1 All it is is a convenience for its users, for -- to
2 learn more information about people that have already,
3 that are already in the client's data set.

4 MR. MASON: If I may --

5 COMMISSIONER WEINTRAUB: Chair Hunter. I'm
6 sorry. Go ahead. I was going to invite Chair Hunter
7 to see if she had any questions. I don't want to
8 ignore her because she's not physically in the room
9 with us.

10 MR. MASON: I don't want to pass by Crowd
11 PAC, and I understand, even on the Commission, there
12 may be slightly different views about sort of how that
13 applies.

14 But I just want to point out that from our
15 perspective Crowd PAC is a fund raising platform. It
16 is an application that is designed for people who make
17 contributions to political campaigns. And the use
18 that was allowed by the Commission in Crowd PAC was
19 actually more extensive than the data that we pull
20 here. Because Crowd PAC, as I understand it, pulls
21 names from the FEC database from related campaigns and
22 displays that information.

23 And so if the distinction is, well, it's
24 okay to use the FEC data when the contributor is
25 looking at candidates to contribute to, but it's not

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1 okay to use the FEC data when the campaign is looking
2 for people to contribute to the campaign, I think
3 you've got something like viewpoint-based
4 discrimination.

5 In other words, it's two sides of the same
6 coin, and it's difficult for us to understand why in
7 Crowd PAC, where you have a for-profit entity, it's
8 making money on processing those political
9 contributions, out there trolling for political
10 contributions, and presenting -- using the FEC data to
11 do it. That's the only reason I say "trolling", it's
12 the only reason the website exists is to facilitate
13 political contributions.

14 And so if they can use that data it's hard
15 for us to understand why we can't use the same data in
16 virtually the same way.

17 COMMISSIONER WEINTRAUB: Well, it's not the
18 same way because there's a statute that was designed
19 to protect contributors. It wasn't designed to
20 protect campaigns. It was designed to protect
21 contributors.

22 And if the contributors themselves are
23 looking for that information, it seems to me that's
24 very different from what you're offering and the
25 audience to whom you're offering it, and the purpose

1 to which they're going to put it. I think that is not
2 a distinction without a difference.

3 MR. MASON: So, I understand. I may not
4 persuade you, but the contributor there is looking up
5 data on other contributors. And so if there is any --
6 if the protection is as to the contributors whose
7 information has been printed off FEC reports, that's
8 undone by Crowd Pac, because there --

9 COMMISSIONER WEINTRAUB: But the contributor
10 who is looking up information on other contributors is
11 not going to solicit those people. It's not -- that's
12 not why they are looking for that information.

13 MR. TORCHINSKY: You're stepping into the
14 minds of users, and I don't know how you -- I don't
15 know how you do that. You have to look at what the
16 product does, not what's in the mind of the user
17 because in our particular case, in Relationship
18 Viewer, you cannot, you cannot get new names and
19 addresses to solicit using Relationship Viewer. And I
20 think that's the bottom line and why we believe this
21 case should be dismissed.

22 COMMISSIONER WEINTRAUB: I hear you.

23 Let me go back to what I was doing before.
24 Chair Hunter, did you want to ask any questions?

25 CHAIR HUNTER: Thank you though for asking.

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1 I appreciate it. Could you hear me?

2 COMMISSIONER WEINTRAUB: It's a little bit
3 fuzzy. I'm sorry, was that a yes or a no?

4 CHAIR HUNTER: I don't have any questions at
5 this point, but thank you for asking.

6 COMMISSIONER WEINTRAUB: Okay. Well, we
7 didn't want to leave you out.

8 CHAIR HUNTER: Thank you.

9 COMMISSIONER WEINTRAUB: Commissioner
10 Petersen.

11 COMMISSIONER PETERSEN: I just have one
12 final clarification which is kind of just a little bit
13 of an add-on of the summary that I made before about
14 the distinction that you are drawing between using FEC
15 data to gain extra names, to gain extra individuals to
16 target for solicitations, and obviously it falls
17 within the prohibition of the statute.

18 MR. TORCHINSKY: Yes.

19 COMMISSIONER PETERSEN: But it is your
20 argument that if you have a name who is already going
21 to be a target for solicitation, that's someone that
22 you've legitimately gotten onto your list through
23 whatever mechanism you did, other than, obviously,
24 taking them directly from FEC reports, but if they are
25 already on your name -- on your list, you're going to.

1 target them for solicitation, then a limited use of
2 FEC data for determining how the pitch is going to be
3 made is not an illegitimate use; doesn't fall within
4 the prohibition of the statute.

5 MR. TORCHINSKY: That is correct.

6 COMMISSIONER PETERSEN: Okay. Just wanted
7 to make sure I was clear on that.

8 COMMISSIONER WEINTRAUB: Does anybody from
9 the Office of General Counsel want to ask any
10 questions?

11 Commissioner Walther, do you have something?

12 COMMISSIONER WALTHER: No. I have interest
13 in general counsel's response to the issue of the
14 basis on which we recommend that they move forward.
15 In fact, there is basic solicitation for the use of
16 this product.

17 MS. STEVENSON: And I think we -- this forum
18 is an opportunity to hear from counsel for Aristotle.
19 We'd be happy to provide our reaction and legal advice
20 to the Commission in a different context, if that
21 would be helpful.

22 COMMISSIONER WEINTRAUB: Well, if there are
23 no further questions, then I believe you wanted to
24 make a closing statement. I invite you to do so.

25 MR. TORCHINSKY: I think I just gave my

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1 conclusion in response to Commissioner Petersen, so I
2 don't want to take more of the Commission's time and
3 just continue to repeat myself.

4 And with that we thank you very much for
5 hearing us today.

6 COMMISSIONER WEINTRAUB: And we thank you
7 for coming, and appreciate all the information that
8 you have provided.

9 With that, this hearing is adjourned.

10 (Whereupon, at 2:48 p.m., the hearing in the
11 above-entitled matter adjourned.)

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REPORTER'S CERTIFICATE

DOCKET NO.: N/A
CASE TITLE: Probable Cause Hearing MUR 6334
HEARING DATE: September 5, 2018
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I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Election Commission.

Date: September 5, 2018

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